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No. 82-1427

In the Supreme Court of the United States

OCTOBER TERM, 1982

HELGA MARIE ADAMS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether evidence obtained pursuant to consensual wiretaps, legal under federal law but allegedly illegal under state law, was properly admitted in a federal prosecution.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A11) is reported at 694 F.2d 200. The opinion of the district court (Pet. App. B1-B19) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. C1-C2) was entered on December 7, 1982. The petition for a writ of certiorari was filed on February 5, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On August 7, 1981, a federal grand jury in the District of Hawaii returned a 12-count indictment charging petitioners with offenses relating to obscene materials that involve the sexual exploitation of minors. Count 1 charged all petitioners with conspiring to receive for the purpose of distribution for sale, and to sell and distribute for sale,

obscene visual and print media, the production of which used and depicted minors engaging in sexually explicit conduct, in violation of 18 U.S.C. 371. Counts 2 through 5 charged all petitioners with specific substantive offenses, in violation of 18 U.S.C. 2252(a)(2). Counts 6 through 11 charged petitioner Proctor with additional substantive offenses, also in violation of 18 U.S.C. 2252(a)(2), and Count 12 charged him with transport of the same type of materials, in violation of 18 U.S.C. 2252(a)(1). After a bench trial, petitioners were convicted as follows: Proctor, Counts 1, 2, 3, 4 and 12; Adams, Counts 1, 3 and 4; Mummert, Count 4.[1]

Petitioner Proctor was sentenced to five years' probation on Count 1, and concurrent ten-year terms of imprisonment on Counts 2, 3, 4 and 12, subject to later modification following a study as provided in 18 U.S.C. 4205(c). Petitioner Adams was sentenced to five years' probation on Count 1 and concurrent four-year terms of imprisonment on Counts 3 and 4. Petitioner Mummert was committed to the custody of the Attorney General for observation and study under the Federal Youth Corrections Act, 18 U.S.C. 5010(e).

2. The investigation that led to this prosecution was initiated as a joint federal and state undercover investigation of alleged violations of both federal and state laws regarding child pornography (Pet. App. B3). As part of the investigation, United States Customs Agent Darryl Cosme posed as a pornography distributor, and between May 9 and 20, 1980, he recorded—by means of tape recording,

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[1]Also charged on Counts 1 through 5 was co-defendant Shingaki. He was convicted on Counts 1, 2, 3 and 4, and was sentenced to five years' probation on Count 1 and concurrent four-year terms of imprisonment on the remaining counts.

video tape and body (audio tape) recorder—his conversations and meetings with petitioners (*id.* at B3-B4). A Honolulu Police Department officer installed the tape recording and videotaping equipment, and each conversation or meeting was monitored by both a local police officer and a United States customs officer (E.R. 197-199).[2] Agent Cosme was a party to each of the recorded conversations, and he gave his consent to each recording (*ibid.*; Pet. App. B4).

3. Prior to trial, petitioners moved for an order suppressing all evidence obtained or derived from the interception of wire or oral communications between them and Agent Cosme. Petitioners argued that this evidence was obtained in violation of Hawaii law, which, they contended, had been adopted and incorporated into federal law by a provision of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2516(2).[3] The district court denied the motion (Pet. App. B1-B19). The court ruled that the intercepted conversations were exempt from the provisions of Title III in light of 18 U.S.C. 2511(2)(c), which provides that warrantless recordings of conversations are not unlawful so long as one party to the conversation consents to the recording (Pet. App. B10-B12, B17-B18).

On appeal, petitioners again claimed that, despite the consensual nature of the interceptions, the conversations could not be admitted because they violated Hawaii law (Pet. A3-A4). The court of appeals summarily disposed of the claim on the basis of clear circuit precedent that "evidence obtained from a consensual wiretap conforming to

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[2]"E.R." refers to the Excerpts of Record in the court of appeals.

[3]Section 2516(2) establishes procedures to be followed by state prosecutors seeking wiretap authorizations from state court judges. It requires compliance with applicable state statutes as well as the provisions of Title III.

18 U.S.C. section 2511(2)(c) is admissible in federal court proceedings without regard to state law. *United States* v. *Hall*, 543 F.2d 1229, 1234-35 (9th Cir. 1976) (*en banc*), cert. denied, 429 U.S. 1075 (1977); *United States* v. *Keen*, 508 F.2d 986, 989 (9th Cir. 1974), cert. denied, 421 U.S. 929 (1975)" (Pet. App. A4-A5).

ARGUMENT

Petitioners contend (Pet. 8-16) that the decision of the court of appeals (1) contravenes the intent of Congress to incorporate state wiretap standards into Title III, thereby encouraging lawless behavior by state law enforcement officials, and (2) deprives petitioners of equal protection of the laws. Petitioners' contentions are without merit and have been rejected by every court of appeals that has had occasion to consider them.

1. Petitioners' argument that Congress intended state wiretap standards to govern the admissibility of evidence in federal court arises from a fundamental misapprehension of the scope of Title III. Section 2511(1) sets forth the prohibitions concerning interception of oral and wire communications. Section 2511(2) specifically exempts certain interceptions from the coverage of Title III. Among the explicitly exempted interceptions are those by "a person acting under color of law * * * [who] is a party to the communication * * *" (18 U.S.C. 2511(2)(c)). The remaining provisions of Title III, including those applicable when permission to intercept is sought from a state court judge (18 U.S.C. 2516(2)), do not apply to exempted interceptions. That simple proposition was the basis for the correct conclusion by the court of appeals that the challenged interceptions were properly admitted in this federal proceeding.[4]

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[4]Petitioners contend (Pet. 12) that Section 2517(1) and (2), governing disclosures of intercepted conversations by any law enforcement official "to the extent such use is appropriate to the proper performance of [his]

The court of appeals also correctly refused to reach the question whether the interceptions violated Hawaii law. Whether evidence is admissible in a federal court is a question of federal law, see, *e.g.*, *Elkins* v. *United States*, 364 U.S. 206, 223-224 (1960); *United States* v. *Zemek*, 634 F.2d 1159, 1164 n.4 (9th Cir. 1980), cert. denied, 450 U.S. 985 (1981); Fed. R. Evid. 402, and federal law clearly permits the admission of consensual wiretap evidence irrespective of whether it conforms to state wiretap standards. See, *e.g.*, *United States* v. *Horton*, 601 F.2d 319, 323 (7th Cir.), cert. denied, 444 U.S. 937 (1979); *United States* v. *Nelligan*, 573 F.2d 251, 253 (5th Cir. 1978); *United States* v. *Hall*, *supra*, 543 F.2d at 1234-1235; *United States* v. *Shaffer*, 520 F.2d 1369, 1371-1372 (3d Cir. 1975), cert. denied, 423 U.S. 1051 (1976); *United States* v. *Neville*, 516 F.2d 1302, 1309 (8th Cir. 1975); *United States* v. *Keen*, *supra*, 508 F.2d at 989.[5]

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official duties," incorporates state standards. The courts to which that argument has been addressed have rejected it, concluding instead that the provision was intended "to protect the public from unnecessarily widespread dissemination of the contents of interceptions and from the wholesale use of information gleaned from a legal wiretap by an officer—state or federal—for personal or illegal purposes." *United States* v. *Hall*, *supra*, 543 F.2d at 1233; *United States* v. *Daniel*, 667 F.2d 783, 784 (9th Cir. 1982). Petitioner cites no authority to the contrary.

Petitioners' only other argument for the proposition that Hawaii law is not preempted by Title III's exemption for consensual wiretaps is the statement in the Senate Report that "[t]here is no intent to preempt State law." S. Rep. No. 1097, 90th Cong., 2d Sess. 93 (1968). But petitioners neglect to point out that this sentence appeared in a discussion of 18 U.S.C. 2511(1)(c) and (d), which govern the disclosure or use of the contents of intercepted communications by people who know or have reason to know that the information was obtained through an interception in *violation* of Title III. The passage thus has no bearing on the question in this case.

[5]Moreover, it is not at all clear that Hawaii law regarding consensual recordings is more restrictive than federal law. Petitioners rely on language in the Hawaii State Constitution (Pet. 2-3), but that language

Petitioners nevertheless argue (Pet. 11) that the effect of the court of appeals' decision is to encourage state law enforcement officers to violate state law, thereby " 'endors-[ing] a novel variation on the sort of illegal trade-off repudiated by [this] Court in *Elkins* v. *United States*, 364 U.S. 206 (1960),' " quoting *United States* v. *Hall*, *supra*, 543 F.2d at 1237 (Koelsch, J., dissenting). This claim ignores the rationale of *Elkins*.

In *Elkins*, the Court invoked its supervisory power over the lower federal courts to hold that "evidence obtained by state officers during a search which, if conducted by federal officers, would have violated the defendant's immunity from unreasonable searches and seizures under the Fourth Amendment is inadmissible over the defendant's timely objection in a federal criminal trial" (364 U.S. at 223; footnote omitted). After *Wolf* v. *Colorado*, 338 U.S. 25 (1949), both logic and concern for judicial integrity compelled that result. See *Elkins*, 364 U.S. at 213-216, 222-223. The effect of *Elkins* was that no federal officer would be able to circumvent the requirements of the Constitution by resort to his state counterpart. Contrary to petitioners' argument, the decision below does not turn *Elkins* on its head. It simply recognizes that, even if evidence is obtained in violation of state law (but see note 5, *supra*), it is admissible in a federal criminal proceeding so long as it was obtained in a manner that comports with federal law. Any speculation

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does not explicitly address the factual situation presented here, and there is as yet no Hawaii Supreme Court decision resolving the conflicting lower state court decisions. See *Hawaii* v. *Okubo*, Cr. No. 55122 (1st Cir. Hawaii Sept. 4, 1981), appeal pending, No. 8286 (Sup. Ct. Hawaii) (E.R. 115-149); *Hawaii* v. *Harris*, Cr. No. 55905 (1st Cir. Hawaii Nov. 6, 1981) (E.R. 166-168); *Hawaii* v. *Galaza*, Cr. No. 55080 (1st Cir. Hawaii June 30, 1981) (E.R. 172-177). In the absence of a definitive ruling by the Hawaii Supreme Court, this Court should not presume that Hawaii law is any more restrictive than federal law on the subject of consensual recordings.

that the decision encourages a Hawaii law enforcement official to violate state law is a policy argument that is more properly addressed to the Hawaii courts and legislature than the federal courts. See *Elkins*, 364 U.S. at 221 ("The question with which we deal today affects not at all the freedom of the states to develop and apply their own sanctions in their own way"); see also *United States* v. *Shaffer*, *supra*, 520 F.2d at 1372.

2. Petitioners' final argument—that the decision below deprives them of equal protection of the laws—is raised in this Court for the first time. Absent exceptional circumstances not present in this case, this Court will not decide a question that was not presented to the courts below. *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). In any event, the argument is frivolous.

Petitioners claim that Title III sets up two classes of people—those whose conversations are intercepted by state officers through a consensual wiretap and those whose conversations are intercepted by state officers pursuant to a state warrant. While that claim may be correct, it does not make out an equal protection violation. It is simply a statutory distinction based on the rational decision that one type of interception implicates no Fourth Amendment interest requiring a warrant.[6] Classification is endemic to all legislation. Only legislation that treats similar people differently or different people as if they were the same offends the principle of equal protection. Title III does no such thing.

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[6]That Congress has decided that an application to a state judge for a warrant also requires conformance to state law is similarly a rational, non-discriminatory distinction, *United States* v. *Yazzie*, 693 F.2d 102, 104 (9th Cir. 1982), that happens also to satisfy petitioners' concern (Pet. 15-16) for federal-state comity.

What petitioners are really saying is that their conversations might have been treated differently under state law. This Court answered that argument in *United States* v. *Antelope*, 430 U.S. 641 (1977), in which Indians challenged the application to them of a felony-murder provision, 18 U.S.C. 1111, under the federal Major Crimes Act, 18 U.S.C. 1153, for an offense committed on an Indian reservation in Idaho, a state that does not have a felony murder provision. This Court held that "it is of no consequence that the federal scheme differs from a state criminal code * * *. Under our federal system, the National Government does not violate equal protection when its own body of law is evenhanded, regardless of the laws of States with respect to the same subject matter" (430 U.S. at 648-649; footnotes omitted). There is no need to address this issue again.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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